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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. GENEA NICOLE RICHARDSON, Defendant and Appellant.	2d Crim. No. B205162 (Super. Ct. No. VA072163) (Los Angeles County)

Genea N. Richardson appeals her conviction by jury for the first degree murder of Gregory Palmer (Pen. Code, §§ 187, subd. (a), 189)[1] with the special circumstance of commission in the course of a robbery (§ 190.2, subd. (a)(17)(A)) and for second degree robbery of Palmer. (§§ 211, 212.5, subd. (c).) The jury found true an allegation as to both crimes that appellant was armed with a firearm. (§ 12022, subd. (a)(1).) The trial court sentenced appellant to 26 years to life in prison for the murder with the firearm enhancement, and a concurrent term of 3 years for the robbery.

Appellant contends that her conviction on both counts should be reversed due to erroneous admission of a hearsay statement, that the sentence on the robbery count should have been stayed pursuant to section 654, and that the abstract of judgment contains a clerical error because it includes two terms for the murder conviction. We

[1] All statutory references are to the Penal Code unless otherwise stated.

agree that the robbery sentence should have been stayed and that the abstract of judgment must be corrected. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening that Gregory Palmer was killed, he went to his mother's house where he counted his cash wages. While there, he received a page from a Travelodge motel, returned the call to room 219, and left for the motel at about 8:40 p.m. saying he was going to spend time with a young woman he had just met. When he left, he had his wallet, cash and keys.

At the Travelodge motel Palmer rented room 217 for one night. Witnesses saw Palmer arrive and saw two young women run to his car. A witness saw these young women go up a stairway to the second floor and, a few minutes later, heard gun shots and saw the women run down the second floor hallway with an older man. The hand of one woman was concealed in her sweatshirt. The witness ran after the women. Several other witnesses saw the women run toward Artesia Boulevard. A witness subsequently saw two young women crouching in bushes and giggling at an apartment building next door to the Travelodge. Appellant's mother lived in the apartment building next door to the Travelodge. A call had been placed to the mother's apartment from room 219. Witnesses identified Sandra Dews and appellant in photo six packs with varying degrees of certainty.

Palmer was found lying on the landing in front of room 217 with two gunshot wounds to his neck and chest. There was blood inside the room. Palmer later died from his wounds. His watch, pager and car were recovered but his wallet, cash and keys were not found.

Sandra Dews had rented Travelodge room 219 that night, adjacent to 217. Before the shooting, Dews and appellant were at the apartment complex of Zakiyyah Wilkerson. In appellant's presence, Dews said to Wilkerson that she and appellant were going to do a "come-up" at a motel. Wilkerson so testified at trial. A "come-up" is slang for getting money from somebody, and can include robbery, according to Wilkerson. Dews and appellant left Wilkerson's apartment together to go to the motel. After the

shooting, appellant returned alone to Wilkerson's apartment and said that Dews had robbed and shot a man while appellant was in the room. Appellant told Wilkerson that she did not know that Dews was going to rob or shoot the man.

Dews was tried and convicted separately. She was unavailable to testify at appellant's trial because she invoked the fifth amendment privilege against self-incrimination.

Appellant was 17 years old at the time of her crimes. Because of her youth, the trial court sentenced her to 25 years to life in prison for the special circumstance murder instead of life without possibility of parole. (§ 190.5, subd. (b).) The court sentenced her to a concurrent midterm of 3 years for the robbery. (§ 213, subd. (a)(2).) For the murder, the abstract of judgment shows both a term of life with the possibility of parole and a term of 25 years to life.

DISCUSSION

Hearsay

Appellant contends that her convictions must be reversed because the court erroneously admitted Dews' out of court statement that she and appellant were going to do a "come-up." Appellant contends the statement was hearsay subject to no exception and that its admission was prejudicial because it was the only evidence of intent to rob or intent to aid and abet a robbery. We disagree. The trial court did not abuse its discretion when it determined that the statement was admissible for the nonhearsay purpose of proving appellant's knowledge of Dews' plan to rob Palmer and the effect of the statement upon appellant's subsequent conduct. (Evid. Code, § 1250)

Subject to indicia of trustworthiness, evidence of a statement of the declarant's then existing state of mind, including intent or plan, is not made inadmissible by the hearsay rule if it is offered to prove the declarant's state of mind at a relevant time or to explain the acts or conduct of the declarant. (Evid. Code, §§ 1250, 1252.) An out of court statement is also admissible under section 1250 to prove the effect it had on the state of mind of the recipient, or to explain the recipient's conduct ensuing from the statement. (*People v. Duran* (1976) 16 Cal.3d 282, 295 [warnings given to defendant

admissible to prove effect on his state of mind]; *People v. Roberson* (1959) 167 Cal.App.2d 429, 431 [statement heard by defendant that undercover agent was a police officer admissible to prove defendant knew agent's identity].) We review the trial court's determination that an out of court statement falls within an exception to the hearsay rule for abuse of discretion. (*People v. Cudjo* (1993) 6 Cal.4th 585, 607.)

The trial court admitted Dews "come-up" statement for the "non-hearsay" purpose "to explain what the parties did afterwards . . ." or to "explain the additional behavior of anybody." We understand this to be a reference to section 1250, subdivision (a)(2), allowing state of mind evidence offered to prove or explain acts or conduct of the declarant or recipient. The trial court acted within its discretion when it admitted the statement.

The trial court initially sustained a hearsay objection to the "come-up" statement, but appellant's counsel opened the door to it by eliciting testimony that the robbery surprised appellant. Wilkerson testified that appellant returned from the motel in hysterics and that appellant said she was in the room when Dews shot a man. During cross-examination Wilkerson elaborated, stating that when appellant returned she said, "[S]he didn't know [a robbery and shooting] was going to happen." "[I]t wasn't that she knew about it at all, what was going to happen." There was no objection to these statements. On redirect, the prosecutor asked, "[Appellant] said that she didn't know that Dews was going to rob this guy? Did she say that?" and Wilkerson responded, "No, she did not know–well, it was something–I take that back. [¶] We had–when Miss Dews had came, when she came, she said it was a come-up, but she didn't say it was a robbery." Defense counsel moved to strike. This time the trial court overruled hearsay and relevance objections, admitting the evidence to prove or explain subsequent conduct.

Appellant contends that the statement should not have been admitted against her because she was not the declarant. The "come-up" statement was certainly relevant to prove the state of mind of the declarant and her subsequent conduct in conformity, i.e., Dews' intent to rob Palmer and robbery of Palmer (*People v. Sanders* (1995) 11 Cal.4th 475, 518), but it was also relevant to prove appellant's knowledge of

the robbery plan. There was sufficient evidence to infer that appellant was present when the statement was made because Wilkerson testified that both women were at her apartment complex before they went to the motel. The statement was used to prove that appellant knew of the robbery plan when she went to the motel, and to disprove surprise. In closing argument the prosecutor stated that the "come-up" statement proved Palmer was "murdered for his property" and that Dews and appellant were "planning a robbery, so it's already premeditated."

Appellant's reliance on *People v. Scalzi* (1981) 126 Cal.App.3d 901 is misplaced because appellant was present when the statement was made. In *Scalzi*, telephone statements made by an unidentified person to a recipient who was not the defendant were not admissible because the state of mind of the recipient was not relevant to any issue in the case. (*Id.* at pp. 906-907.) Appellant also relies on *People v. Smith* (1986) 187 Cal.App.3d 666. *Smith* was disapproved in *People v. Carter* (2003) 30 Cal.4th 1166, and does not apply because the "come-up" statement was not admitted as an adoptive admission or co-conspirator's statement. Appellant's counsel did not object at trial on the federal constitutional grounds now asserted, but even if he had, the statement was non-testimonial and there were sufficient indicia of reliability to satisfy the Confrontation Clause of the 6th amendment to the United States Constitution.

Stay of Robbery Sentence

Appellant contends that her robbery sentence should have been stayed pursuant to section 654 because the single act of robbery made the murder first degree murder and was also the basis for the robbery conviction. We agree.

An act punishable under different criminal provisions may be punished under only one. (§ 654.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) In the case of a robbery predicate to felony murder, if "there was but one act and . . . the act of robbery was the act which

made the homicide first degree murder," the robbery sentence must be stayed pursuant to section 654. (*People v. Mulqueen* (1970) 9 Cal.App.3d 532, 547.) The resolution of the question whether there was a single intent or objective "is one of fact and the trial court's finding will be upheld on appeal if it is supported by substantial evidence." (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) Here the trial court made no express finding on the question. Neither the court, counsel nor the probation report addressed section 654. Substantial evidence would not support an implied finding that the act of robbery was divisible in this case. The robbery sentence should have been stayed pursuant to section 654.

We reject respondent's argument that the act of robbery was not the act that made the homicide first degree murder. Respondent argues that the jury may have believed the murder was premeditated. It is true that the jury was instructed on alternate theories of first degree murder: murder during the course of a robbery and premeditated murder. However, the evidence of premeditated murder against appellant was not substantial and the prosecutor relied on the felony murder rule to obtain the first degree murder conviction. In closing argument, the only evidence he was able to cite to prove premeditated murder was the telephone call arranging to meet Palmer at the motel and the existence of a gun at the scene. He emphasized that whether or not the killing was premeditated, and whether or not appellant had the gun, appellant was guilty of first degree murder because the killing happened in the course of a robbery. We conclude that the robbery sentence must be stayed.

Clerical Error in Abstract of Judgment

The abstract of judgment contains a clerical error. The trial court sentenced appellant to a term of 25 years to life on count 1, but the abstract of judgment reflects imposition of two terms for count 1: a term of 25 years to life and a term of life with possibility of parole for count 1. Appellant and respondent agree that the error must be corrected.

We modify the judgment to reflect a stay of sentence pursuant to section 654 regarding count 2, robbery, and to correct the abstract of judgment to reflect

imposition of a single term of 25 years to life for count 1. The trial court shall amend the abstract of judgment accordingly and forward the amended abstract to the Department of Corrections. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Robert J. Higa, Judge

Superior Court County of Los Angeles

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

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